

**STATE OF TENNESSEE
DEPARTMENT OF ENVIRONMENT AND CONSERVATION**

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SECRETARY OF STATE

IN THE MATTER OF:)	DIVISION OF WATER
)	POLLUTION CONTROL
SCHUBERT BUILDERS, INC.,)	
SCHUBERT BUILDERS, LLC,)	
FARRAGUT DITCHING)	
COMPANY, INC.,)	
PATRICK J. SCHADD d/b/a SCHAAD)	Docket No. 04.30-045806A
PROPERTIES, and)	
M. ALEX SCHUBERT, JR., AND JOHN)	
SCHUBERT, INDIVIDUALLY)	
RESPONDENTS)	CASE NO. 02-0155
)	

AGREED ORDER

This matter came to be heard before the Tennessee Water Quality Control Board upon the Commissioner's Order and Assessment of Civil Penalty, as the Commissioner's duly authorized representative, and the Respondent's Petition to Appeal. While Respondents deny any and all liability for allegations contained in the Director's Order and Assessment, for settlement purposes in this action only, and without admitting or denying the veracity of the statements contained herein, the Director and the Respondents have agreed to and the Board, therefore, adopts the following findings of fact and conclusions of law and order to which the Commissioner and the Respondents have agreed, as is shown by signature of authorized representatives.

PARTIES

I.

James H. Fyke, is the duly appointed Commissioner of the Tennessee Department of Environment and Conservation (hereinafter the "commissioner" and the "department" respectively).

II.

Schubert Builders, Inc., is a domestic corporation in Knox County, Tennessee. Service of process may be made on Schubert Builders, Inc. through the registered agent, Jan Stinnett, 1601 Third Creek Road, Knoxville, Tennessee 37921.

III.

Schubert Builders, LLC, is a domestic limited liability company in Knox County, Tennessee but is no longer active. The managing members were M. Alex Schubert, Jr. and John C. Schubert.

IV.

Patrick Schaad is an individual doing business as Schaad Properties, in Knox County, Tennessee.

V.

Farragut Ditching Company, Inc. is an excavation company in Knox County, Tennessee.

VI.

M. Alex Schubert, Jr. is an individual resident of Knox County, Tennessee.

VII.

John Schubert is an individual resident of Knox County, Tennessee.

JURISDICTION

VIII.

Whenever the commissioner has reason to believe that a violation of Tennessee Code Annotated Section 69-3-101 *et seq.*, the Water Quality Control Act, (hereinafter the "Act") has occurred, or is about to occur, he may issue a complaint to the violator and he may order corrective action be taken pursuant to T.C.A. §69-3-109(a) of the Act. Further, the commissioner has authority to assess civil penalties against any violator of the Act, pursuant to T.C.A. §69-3-115 of the Act; and, has authority to assess damages incurred by the State resulting from the violation, pursuant to T.C.A. §69-3-116 of the Act. Department Rules governing general water quality criteria and use classifications for surface waters have been promulgated pursuant to T.C.A. §69-3-105, and are effective as the Official Compilation Rules and Regulations of the State of Tennessee (hereinafter "Rule"), Chapters 1200-4-3 and 1200-4-4.

IX.

The Respondents meet the definition of a "person" as defined at T.C.A. §69-3-103(20). As hereinafter stated, the Respondents have violated the Act. For purposes of this Action only, Respondent Schubert Builders, LLC has taken all responsibility for actions pursuant to the Agreed Order.

FACTS

X.

The Division of Water Pollution Control (hereinafter the "division") is responsible for enforcing the Act, and, therefore, the division requires coverage under a National Pollutant Discharge Elimination System (hereinafter "NPDES") Construction Storm Water Permit for discharges of storm water runoff from land disturbed by construction activity that totals five or more acres to comply with the Act.

XI.

Knob Fork, a tributary to Beaver Creek, is "waters of the state" as defined by T.C.A. §69-3-103(33). Pursuant to T.C.A. § 69-3-105(a)(1), all waters of the state have

been classified by the Tennessee Water Quality Control Board for suitable uses. Department Rule 1200-4-4, *Use Classifications for Surface Waters*, is contained in the *Rules of Tennessee Department of Environment and Conservation Division of Water Pollution Control Amendments*. Accordingly, the Knob Fork has been classified for the following uses: fish and aquatic life, recreation, irrigation, livestock watering and wildlife.

XII.

Division personnel received a complaint concerning sediment from the Sterchi Hills Subdivision (hereinafter the "site") entering Knob Fork. Division personnel investigated this complaint on March 22, 2001 and discovered that the site contained approximately 42 acres that had been cleared, grubbed and had soil in an unstable condition. Division personnel determined that a significant amount of erosion had occurred and sediment had entered nearby Knob Fork.

Division personnel reviewed the active permits and discovered that the Respondents were not covered under an NPDES permit for storm water discharges prior to beginning construction on the site.

Upon further review the Division found that Respondent Alex Schubert's father's company was the original permittee on the Site. After his father died, the property was inherited by the Schuberts and it lay fallow for some time until Division personnel met with representatives from Schubert Builders, LLC. Even though there were no immediate plans to further develop the property, Alex Schubert on behalf of the company agreed to sign the Notice of Intent. Most of the events related in this order occurred prior to Schubert Builders, LLC and its principals involvement in the Site.

XIII.

On March 27, 2001, a certified Notice of Violation (hereinafter "NOV") was sent to the Respondents for violations noted during the investigation conducted on March 22, 2001. The NOV instructed the Respondents to stabilize the site immediately with appropriate erosion control measures and that a Compliance Review Meeting would be held on April 17, 2001.

XIV.

On April 17, 2001, division personnel conducted a follow-up inspection of the site prior to the Compliance Review Meeting to be held later that day. Division personnel inspected the entire site and found that there were no functional sediment barriers installed. There was no erosion control to protect storm drain inlets. Division personnel observed that erosion from the site was continuing to result in sediment entering Knob Fork.

A Compliance Review Meeting between division personnel and the Respondents was held on April 17, 2001 at the Knoxville Environmental Assistance Center.

Division personnel requested that the Respondents immediately submit a Notice of Intent (hereinafter the "NOI") and Storm Water Pollution Prevention Plan (hereinafter the "SWPPP") for the NPDES General Permit for Storm Water Discharges Associated with Construction Activities. Division personnel also reminded the Respondents that adequate erosion controls must be installed immediately and maintained on the site for the remainder of the construction period to prevent further sedimentation in Knob Fork.

XV.

On April 30, 2001, division personnel conducted a follow-up site inspection and found that some silt fences and hay bales had been installed at the site, but that these

controls were inadequate, not installed properly, and/or installed in improper locations, such as in streambeds. This failure to fully implement and maintain erosion controls resulted in sediment entering Knob Fork.

XVI.

On May 3, 2001, division personnel conducted a follow-up site inspection. Division personnel observed that erosion controls were failing to prevent sediment from entering Knob Fork. This resulted in more sediment entering Knob Fork.

XVII.

On May 11, 2001, division personnel received the NOI signed by Alex Schubert, Jr. and James White. The site specific SWPPP required by the NPDES permit for storm water discharges was not enclosed as previously requested by division personnel; therefore the division did not issue coverage under the permit.

XVIII.

On May 16, 2001, another NOV was sent to the Respondents concerning violations noted during the inspections conducted on April 30, 2001 and May 3, 2001 and for failure to submit requested information necessary to obtain coverage under the NPDES General Permit for Storm Water Discharges Associated with Construction Activities.

In the NOV, division personnel instructed the Respondents to take the following actions:

- Submit a complete NOI and SWPPP,
- Submit a written corrective action plan with timelines,

- Add top soil, seed and straw to temporarily stabilize portions of the site where construction will not take place for thirty days or more, and
- Implement permanent stabilization measures at portions of the site where construction is complete.

XIX.

On May 22, 2001, division personnel conducted a follow-up inspection of the site and determined that erosion controls were inadequate and improperly installed. Silt fences were entrenched, but not backfilled. Sediment was noted to be migrating off-site and into Knob Fork.

XX.

On June 5, 2001, the division received a written response to the NOV letter from David Harbin, P.E., on behalf of the Respondents. The Respondents submitted a sediment control plan; however, division personnel determined that the plan was inadequate and did not meet the SWPPP requirements.

XXI.

On June 7, 2001, division personnel met the Respondents on-site and conducted a follow-up inspection. Division personnel concluded that controls throughout the site were inadequate, improperly installed, and were not properly maintained. It was noted that silt fences were backfilled, but had been overwhelmed by storm water and sediment. Present storm water discharges from site were noted to be carrying sediments into Knob Fork. Recent sediment deposition in and around Knob Fork was observed. Division personnel concluded that the site needed a sediment retention basin and informed the Respondents.

XXII.

The Respondents submitted the complete application for a General NPDES Permit to Discharge Storm Water and on June 14, 2001, the division sent a letter to Respondent Schubert confirming that the site was covered by the General NPDES Permit to Discharge Storm Water Associated with Construction Activity as of that date. The Respondents' plan showed the sediment retention basin that had been requested.

XXIII.

On August 27, 2001, division personnel conducted a follow-up site inspection and observed that erosion controls throughout the site continued to be inadequate, improperly installed, and were not properly maintained. Unstable graded soils had not been stabilized as required. The sediment retention basin shown on the SWPPP and discussed during the June 7, 2001 on-site meeting had not been installed.

XXIV.

Division personnel conducted follow-up inspections of the site on January 23, 2002 and April 11, 2002. On both dates, erosion and sediment control measures were inadequate and unmaintained. As of April 11, 2002, the sediment pond had still not been constructed as requested by the Division on June 7, 2001 and as shown in the Respondent's SWPPP. Significant sedimentation was again observed in Knob Fork from this site.

XXV.

The Site is now fully developed, is stabilized and no further water quality concerns are apparent at the Site.

XXVI.

The division incurred expenses of THREE HUNDRED FOURTEEN DOLLARS (\$314.00) in the course of investigating this matter.

VIOLATIONS

XXVII.

By engaging in the activities described above without permit or other authorization, Respondents have violated T.C.A. §69-3-108(a) and (b), which state in pertinent parts:

Section 69-3-108 (a)-Every person who is or is planning to carry on any of the activities outlined in subsection (b), other than a person who discharges into a publicly owned treatment works or who is a domestic discharger into a privately owned treatment works, or who is regulated under a general permit as described in subsection (j), shall file an application for a permit with the commissioner or, when necessary, for modification of such person's existing permit.

Section 69-3-108(b)-It is unlawful for any person, other than a person who discharges into a publicly owned treatment works or a person who is a domestic discharger into a privately owned treatment works, to carry out any of the following activities, except in accordance with the conditions of a valid permit:

- (1) The alteration of the physical, chemical, radiological, biological, or bacteriological properties of any waters of the state;
- (4) The development of a natural resource or the construction, installation, or operation of any establishment or any extension or modification thereof or addition thereto, the operation of which will or is likely to cause an increase in the discharge of wastes into the waters of the state or would otherwise alter the physical, chemical, radiological, biological or bacteriological properties of any waters of the state in any manner not already lawfully authorized.

XXVIII.

By failing to properly install and maintain erosion and sediment controls as stated above, the Respondents have violated the General NPDES Permit for Storm Water Discharges Associated with Construction Activity and T.C.A. §69-3-108(b).

XXIX.

By allowing silt and sediments to migrate into Knob Fork as stated above, the Respondents have caused pollution in violation of T.C.A. §69-3-114(a) which states:

T.C.A. §69-3-114. Causing pollution or refusing to furnish information.

- (a) It is unlawful for any person to discharge any substance into the waters of the state or to place or cause any substance to be placed in any location where such substances, either by themselves or in combination with others, cause any of the damages as defined in §69-3-103(22), unless such discharge shall be due to an unavoidable accident or unless such action has been properly authorized. Any such action is declared to be a public nuisance.

T.C.A. §69-3-103(22) provides:

“Pollution” means such alteration of the physical, chemical, biological, bacteriological, or radiological properties of the waters of this state including but not limited to changes in temperature, taste, color, turbidity, or odor of the waters:

- (A) As will result or will likely result in harm, potential harm or detriment of the public health, safety, or welfare;
- (B) As will result or will likely result in harm, potential harm or detriment of the health of animals, birds, fish or aquatic life;
- (C) As will render or will likely render the waters substantially less useful for domestic, municipal, industrial, recreational, or other reasonable uses; or
- (D) As will leave or will likely leave the waters in such condition as to violate any standards of water quality established by the board.

ORDER

XXX.

WHEREFORE, PREMISES CONSIDERED, the Board hereby ORDERS that:

1. The Respondents are hereby assessed DAMAGES of THREE HUNDRED FOURTEEN DOLLARS (\$314.00) and a CIVIL PENALTY of THIRTY-TWO THOUSAND NINE HUNDRED SIXTY-EIGHT DOLLARS (\$32,968.00) to the department, to be paid as follows:

- a. The Respondents shall pay the DAMAGES of THREE HUNDRED FOURTEEN DOLLARS (\$314.00) and a CIVIL PENALTY to the department of TWENTY FOUR THOUSAND SEVEN HUNDRED TWENTY-SIX DOLLARS (\$24,726.00) within 30 days of the receipt of the Order. In lieu of the payment of TWENTY FOUR THOUSAND SEVEN HUNDRED TWENTY-SIX DOLLARS (\$24,726.00) of the assessed CIVIL PENALTY, Respondent may propose Supplemental Environmental Projects (hereinafter "SEP(s)"). Any such SEP shall be proposed to the Department within thirty (30) days from the entry of this *Consent Order*. The SEP proposed by Respondent shall be in line with the Department's SEP guidelines. Any such proposed SEP(s) must be submitted, in writing, to the Commissioner within sixty (60) days of receipt of this Order. The written proposal must include an estimate of the anticipated cost of the project(s). Before implementing any proposed

SEP(s), the SEP(s) must be approved, in writing, by the Commissioner. The Department has reviewed preliminary plans by Respondents for donation of real property to Knox County for a greenway in the Sterchi Hills neighborhood. Such a proposal is acceptable provided documentation of the value and the nature of the perpetual easements and/or restrictions are provided and approved by the Department. In the event that one or more of the proposed SEP(s) are not approved, the Commissioner may extend the time in which to submit an alternative SEP(s) proposal. If no extension of time is requested or granted, Respondent shall pay the above-assessed CIVIL PENALTY within sixty (60) days of receipt of the Commissioner's letter denying the SEP(s). To receive credit against the CIVIL PENALTY for any approved SEP(s), Respondent must provide documentation to the Department of the actual costs expended on each SEP(s). The value credited against the CIVIL PENALTY for any approved SEP(s) shall be determined by the Department. In the event that Respondent fails to propose SEP(s) within sixty (60) days of the issuance of this Order and Assessment, the assessed TWENTY FOUR THOUSAND SEVEN HUNDRED TWENTY-SIX DOLLARS (\$24,726.00) shall become due and payable immediately

2. The Respondents shall otherwise conduct its business in accordance with the Act and rules promulgated pursuant to the Act.

Further, the Respondents are advised that the foregoing Order is in no way to be construed as a waiver, expressed or implied, of any provision of the law or regulations. However, compliance with the Order will be one factor considered in any decision whether to take enforcement action against the Respondents in the future.

RESERVATION OF RIGHTS

This AGREED ORDER is agreed to by respondents to settle a disputed claim. The foregoing AGREED ORDER is in no way to be construed as a waiver, expressed or implied, of any provision of law or regulations. However, compliance with the Order will be one factor considered in any decision whether to take enforcement action against the Respondents in the future.

By agreeing to the terms of this Order, the parties agree that this Order, including the facts and conclusions of law contained in this Order, and the implementation of the requirements are only for the purposes of this action and cannot be used as evidence of noncompliance with any law or regulation in any other proceeding other than a proceeding to enforce the Order, either by the Department or any third party, or as grounds for any proceeding relative to contractor qualification or disqualification.

REASONS FOR DECISIONS

The Board encourages informal resolution of disputes. Respondent is of the opinion that it has valid factual and legal defenses to the position of the Commissioner as represented in the Commissioner's Order. The Board finds that this Agreed Order is a fair and reasonable resolution of the matters raised by the Commissioner's Order and Respondent's Petition for Appeal. The Board approves of informal resolution of disputes

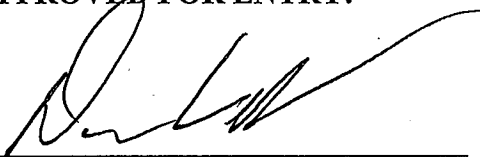
in that such resolutions conserve the resources of the parties and the Board, and are protective of the environment.

A copy of this Agreed Order shall be served upon the Respondents by certified mail, return receipt requested. This final decision and order shall become effective upon entry.

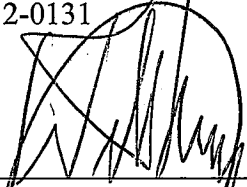
FOR THE TENNESSEE WATER QUALITY CONTROL BOARD:


Chair

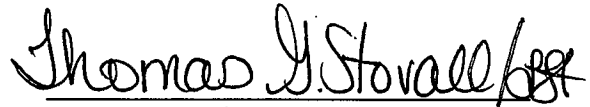
APPROVED FOR ENTRY:



Devin M. Wells, BPR #021059
Tennessee Department of Environment & Conservation
Office of General Counsel
20th Floor, L & C Tower
401 Church Street
Nashville, Tennessee 37243-1548
(615) 532-0131


William L. Penny, BPR #009606
Stites & Harbison, PLLC
Attorney For Respondents
424 Church Street
Suite 1800
Nashville, TN 37219-2376
(615) 782-230

Entered in the Office of the Secretary of State, Administrative Procedures
Division, this 8th day of October, 2007.



Thomas G. Stovall, Director
Administrative Procedures Division

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of this document has been served upon all interested parties by delivering same to their offices or by placing a true and correct copy of same in the United States mail, postage prepaid.

This 8th day of October, 2007.

Devin M. Wells
Assistant General Counsel